Supreme Court, U. S.
FILED
NOV 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978 No. 78-363

MICHAEL GRASSO, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Howard Gittis
Alan J. Davis
Attorneys for Petitioner
Michael Grasso, Jr.

Of Counsel:
WOLF, BLOCK, SCHORR AND SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, Pennsylvania 19102
(215) LOcust 9-4000

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978 No. 78-363

MICHAEL GRASSO, JR., *Petitioner*
v.
UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

The Government attempts to becloud the issue by confusing in its Brief the evidence *before the Grand Jury* with the evidence later produced *at trial*. Petitioner does not claim here that the evidence *at trial* was insufficient or that the government suppressed *at trial* exculpatory evidence. Petitioner does claim that he was deprived of his Fifth Amendment right to indictment by grand jury because before the grand jury there was no evidence that he committed a crime, and exculpatory evidence was deliberately suppressed.

Daniel Culnen testified in his only appearance before the grand jury that he signed the O&A *in blank* on May 10, 1974 and sent it *in blank* to Wisconsin. The O&A was com-

pleted fraudulently at Wisconsin in January, 1975 and filed by Wisconsin with PenDot. *Culnen gave no testimony that it was completed fraudulently by Petitioner.*

Nevertheless, the Indictment supposedly issued by the Grand Jury, charges Petitioner, as follows (29a-30a):

> "15. It was further part of the scheme and artifice to defraud that after being notified of the unacceptability of Rural Mutual:
>
> a. that defendant MICHAEL GRASSO, JR., contacted Daniel Culnen to obtain reinsurance for the above stated Wisconsin Surety bond.
>
> b. that an offer and acceptance was mailed to defendant MICHAEL GRASSO, JR., by Eric Moss, President of Wisconsin Surety to be executed by the reinsurance carrier on or about January 10, 1975.
>
> c. that the offer and acceptance was executed by Daniel Culnen with the reinsurance carrier listed as Summit Insurance Company on or about January 17, 1975, despite the fact that as of July, 1974, Daniel Culnen was the subject of a court restraining order enjoining him from writing any surety bonds or reinsurance for the Summit Insurance Company and that as of January 17, 1975, the Summit Insurance Company was in the process of going into liquidation.
>
> d. that the offer and acceptance was returned to Hul-Mar, Inc., and H&S, Inc., and then submitted to Pendot."

There was, of course, no evidence before the grand jury that Grasso contacted Culnen to obtain reinsurance. Nor was there any evidence that Culnen executed the O&A on or about January 17, 1975, that Grasso solicited Culnen to execute the O&A at any time, nor even that Grasso knew Culnen had no authority to execute the O&A. In short, there was no evidence before the grand jury that Grasso had committed *any* offense in connection with the execution of the O&A.

What then was the basis for the allegations of the Indictment? It obviously was not Culnen's testimony. On the other hand, Culnen was the only person who could have provided the information which appears in the Indictment. Thus, the only possible basis of the Indictment was the "off the record" statement admittedly given by Culnen to the Assistant United States Attorney *after* he appeared before the grand jury. It is undisputed that the "off the record" statement was itself never presented to the grand jury.

Clearly, the Assistant United States Attorney bypassed the grand jury entirely and simply wrote this charge into the Indictment. Petitioner has alleged this fact at each stage of the proceedings *and it never has been denied by the government*. It is obviously the truth! Nevertheless, the government asks this Court to infer what the government knows *not* to be true, namely, that the grand jury inferred petitioner's involvement in the offense from a single scrap of other evidence with which it was presented.

The scrap of evidence is the testimony of convicted felon Eric Moss, former President of Wisconsin, that he "thinks" he mailed the O&A to Petitioner on January 10, 1975, addressed as follows (Gov. Exh. 19, 826a-29a):

> Mike Grasso
> MOUNT VERNON AGENCY, INC.
> 3001 North Fulton Drive
> Suite 809
> Atlanta, Georgia 30305

The proposed inference from this testimony alone is not only fictional, it is preposterous. No one could infer that Petitioner solicited Culnen to execute the O&A fraudulently simply from testimony that Moss "thought" he mailed the O&A to Petitioner. Such an inferential leap would bridge the light years between the simple mailing of a document to a person and the conclusion that such

person thereafter knowingly asked a third person to sign it in violation of a preliminary injunction. Let us assume, however, that with an uncanny ability demonstrated previously only by Sherlock Holmes, the grand jury could have made such an inference. The government ignores the fact that it concealed from the grand jury its knowledge that while Petitioner resided and worked in *Miami*, the O&A was sent to a *mis-address in Georgia with which Petitioner had no connection*. Furthermore, the government hid the fact that there was no forwarding address on file, a fact that would have led the grand jury to conclude that the O&A must have been returned by the postal service to the sender, who was Eric Moss at Wisconsin. This information corroborated Culnen's exculpatory testimony that someone at Wisconsin used a blank O&A previously signed and sent to Wisconsin by Culnen in 1974.

Could a grand jury have made the government's proposed inference in the face of this evidence that even if an O&A was mailed to Petitioner, *it was never received by him*? One thing is clear. Having deliberately suppressed this devastating exculpatory evidence, the government should not be heard to advance such a hypothesis.

The government seeks to dilute its responsibility for suppressing exculpatory evidence by casting the blame on a postal inspector who apparently kept it from the Assistant United States Attorney. The government fails to inform this Court, however, that this very same postal inspector was the prime investigator on the case, testified himself before the grand jury, and sat with the Assistant all during every day of the 4 weeks of the original trial. Although a primary defense of Petitioner was that he never received the O&A, this postal inspector maintained silence throughout.

It is true, of course, that at the second trial the government was able to satisfy the trier of fact that the letter

somehow got from Harrisburg to Georgia to Miami in January, 1975. However, this was the result of new evidence which also was never before the grand jury. The fact remains that *before the grand jury*, Petitioner was wholly innocent and the victim of governmental misconduct. The later events at trial can in no way justify the deprivation of the constitutional right to indictment.*

The government at several points argues that Petitioner has not proven that the Assistant United States Attorney, and not the grand jury, laid the charge in the Indictment. We believe this fact to be clear and inescapable; it is certainly undenied. In any event, the government ignores the fact that Petitioner *has never had a hearing* at which he could call the Assistant to the witness stand. Certainly, on this record, Petitioner was entitled *at least to a hearing*.

Not only has Petitioner never had a hearing, he has never had the benefit of even an opinion on this very substantial issue. Neither the District Court nor the Court of Appeals rendered one. This reflects the rigid Third Circuit view that there should be no inquiry into grand jury proceedings where an indictment is "regular on its face". As this case demonstrates, such a view has the practical effect

---

*** At the second trial, the Government had to prove that the letter mailed on Friday, January 10, 1975, and received at PenDot on Thursday, January 16, 1975, somehow travelled from Harrisburg to the Georgia misaddress, to Petitioner in Miami, back to Harrisburg, and then to PenDot within 4 business days. The theory was that the letter arrived at the post office box of a Harry Walsh, who somehow got the letter to Petitioner in Miami. No direct evidence was presented in support of such theory. On the contrary, the defense called Harry Walsh, who denied ever receiving the letter or forwarding it to Petitioner. Nevertheless, the trial court accepted the government's theory. Unfortunately, this is not an appropriate forum in which Petitioner might argue the sufficiency of the evidence at trial.**

in the Third Circuit of conferring on the prosecution the constitutional power to indict. It is submitted that this state of affairs is both anachronistic and intolerable, and should be remedied by this Court.

Respectfully submitted,

Howard Gittis
Alan J. Davis
Michael Grasso, Jr.
Attorneys for Petitioner

Of Counsel:
WOLF, BLOCK, SCHORR and SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, Pennsylvania 19102